IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 535 of 1996

For Approval and Signature:

HON'BLE MR.JUSTICE M.S.SHAH

HON'BLE MR.JUSTICE BANKIM.N.MEHTA

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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FATABHAI TALABHAI MAKWANA - Appellant(s)

Versus

STATE OF GUJARAT - Opponent(s)

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Appearance :

MR KJ PANCHAL WITH JM PANCHAL for Appellant No(s).: 1.

MR AJ DESAI APP for Respondent No(s).: 1.

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CORAM :HON'BLE MR.JUSTICE M.S.SHAH

HON'BLE MR.JUSTICE BANKIM.N.MEHTA

Date :11/07/2005

CAV JUDGMENT

(Per : HON'BLE MR.JUSTICE BANKIM.N.MEHTA)

1. The appellant – convict has challenged the judgment and order of conviction imposed by the learned Addl. Sessions Judge, Sabarkantha District, at Himmatnagar directing the appellant – convictto undergo life imprisonment for the offence punishable u/s 302 of the I.P. Code and u/s 135 of the Bombay Police Act in Sessions Case No. 97 of 1997.

2. In brief, the prosecution case was that the complainant Udabhai lodged the complaint that when he was cultivating his field his cousin brother Laxmansinh Pratapsinh came to him and informed him that he heard the cries of Savabhai who had gone to answer nature's call in the ravine. So, he went near ravine and saw that the appellant – convict and other persons of Thakarada community were beating Savabhai with sticks and kicks. The appellant – convict inflicted “dhariya” blow on the neck of Savabhai. They had no dispute or quarrel with those persons. But later on it was learnt that the said persons were chasing a rabbit with their dog and his brother and Savabhai intercepted the two animals and saved the rabbit from the dog. Therefore, there was altercation between them so the appellant – convict caused the injury with dharia which resulted into death of Savabhai.

3. On the basis of the complaint, investigation was started. On completion of the investigation, a charge sheet was laid against the appellant and other accused persons for the offences punishable u/s 302 and 34 of the I.P. Code and u/s 135 of the Bombay Police Act.

4. The offences being triable exclusively by the Sessions Court, the case was committed to the Sessions Court, Sabarkantha District, at Himmatnagar. The learned Sessions Judge recorded the plea of the appellant – convict and other accused persons who pleaded not guilty to the charge and therefore the charge for the offences punishable u/s 302 and 34 of the I.P. Code and u/s 135 of the Bombay Police Act was framed against the appellant – convict and other accused persons. The learned Sessions Judge, recorded the evidence and at the end of the trial, the appellant - convict was found guilty for the offence punishable u/s 302 of the I.P. Code and for the offence punishable u/s 135 of the Bombay Police act, whereas other accused persons were convicted for lesser offence. The learned Sessions Judge directed the Appellant-Convict to undergo life imprisonment and to pay fine of Rs.5,000/- in default thereof to undergo Rigorous Imprisonment of six months but did not pass any order of separate sentence for the other offence. Against the same, the present appeal is filed by the appellant – convict challenging the judgment and order of conviction passed by the learned Addl. Sessions Judge, Himmatnagar.

5. When we took up the matter for final hearing, it was found that the State had preferred Appeal No. 657/96 for enhancement of sentence passed against other accused persons. This Court had in the said proceeding called for Record and Proceeding of the case. After hearing, this Court (Coram : N.J. Pandya, J, as he then was) had rejected the appeal. Therefore, the judgment and order of conviction passed against other accused persons became final. It appears that thereafter Record and Proceeding was sent back to the trial Court. When this appeal came up for hearing before us, we found Letter No.115 of 2004 dated 27-1-2004 written by the District Judge, Sabarkantha District at Himmatnagar that his office had destroyed the record and proceeding through oversight and therefore paper book was not prepared. Therefore, we have no other

material except the judgment and the copy of the complaint to reappreciate the evidence adduced in the trial court.

6. Learned advocate Mr. K.J. Panchal, for the appellant appearing for Mr. J.M. Panchal for the appellant – convict has submitted that the conviction u/s 302 of the I.P. Code is bad in law as there was no motive to commit the offence. It is also submitted that the incident had occurred all of a sudden and in spur of a moment. There was no pre-meditation and there was no repetition of blows. Therefore, at the most accused can be convicted for the offence punishable u/s 304 Part-II of the I.P. Code. He has relied upon various authorities in support of his arguments.

7. Learned A.P.P. Mr. A.J. Desai has supported the judgment and order of the learned Addl. Sessions Judge and submitted that the act is done in a cruel manner and therefore no interference is required.

8. The complaint filed by Udabhai Bhalabhai before the Police indicates that the appellant and other accused were chasing a rabbit with a dog and the deceased Savabhai saved the rabbit. Therefore, there was altercation and the appellant and other persons attacked the deceased with sticks and “dhariya”. It appears that a single blow of “dhariya” was inflicted on the neck of the deceased. The complaint also shows that there was no previous enmity between the appellant and the deceased. But altercation ensued only because Savabhai caught the rabbit which was being chased by the appellant – convict and other accused persons. It also appears that the quarrel started only after the deceased caught the rabbit and therefore the incident occurred in the heat of passion upon a sudden quarrel. Therefore, it cannot be said that there was premeditation to cause death of the victim. Therefore, the submission of the learned advocate for the appellant – convict that there was no motive and no premeditation requires to be accepted. It also appears that only one blow was inflicted on the deceased. Therefore, it cannot be said that the appellant – convict attacked the victim in a cruel manner. It is true that the weapon used in the offence was a lethal weapon. It can also be presumed that the person using the lethal weapon had knowledge that the use of such weapon is likely to cause death. But in this case, the lethal weapon was used without any premeditation. The crime was committed upon a sudden quarrel and the Appellant-Convict did not take undue advantage. The Appellate-convict did not act in cruel or unusual manner Therefore, the case would fall under Exception 4 of Section 300 of I.P.Code. Therefore, the learned Addl. Sessions Judge has committed an error by convicting the the appellant – convict u/s 302 of the I.P. Code. Therefore, conviction u/s 302 of the I.P. Code cannot be sustained.

9. In the case of Jagtar Singh V/s. State of Punjab, reported in AIR 1983 SC 463, relied upon by Mr.Panchal, the Supreme Court converted conviction u/s 302 of the I.P. Code to Section 304 Part-II as knife blow was inflicted on chest in sudden quarrel.

10. On the other hand, in the judgment of Gurdip Singh and another Vs. State of Punjab, reported in AIR 1987 SC 1151, the Supreme Court has converted conviction u/s 302 to Section 304 Part-I, as two injuries were caused to the deceased out of which one was sufficient in the ordinary course of nature to cause death. In another judgment of Mahesh Vs. State of Madhya Pradesh, reported n

1997 SCC (Criminal) 181, the Supreme Court converted conviction u/s 302 to Section 304A Part-I in a case wherein there was absence of pre-meditation and a single “pharasi” blow on the head of the deceased was given by the convict and there was no other injury caused to the deceased.

11. In view of the above discussion and the ratio laid down in the above judgments and also considering the fact that there was no premeditation, in our considered view, the conviction u/s 302 of the I.P. Code cannot be sustained. Considering the facts and circumstances of the case and the material available with us, we are of view that the appellant/convict committed the offence upon a sudden quarrel and inflicted 'Dharia' blow on the vital part of the body of Savabhai resulting into his death, and therefore, the conviction u/s 302 of the I.P. Code is required to be converted into the conviction u/s 304 Part-I of the I.P. Code. As regards conviction u/s 135 of Bombay Police Act, learned Sessions Judge has not assigned any reason as to on what evidence the conviction is based. Therefore, conviction for the said offence cannot be sustained.

12. Now we come to the question of sentence. The degree of culpability of the accused in culpable homicide not amounting to murder is obviously less than the degree of culpability in culpable homicide amounting to murder and, therefore, the period of imprisonment for the offence punishable under section 304 Part I, IPC would also be ordinarily shorter than the period of imprisonment for the offence punishable under Section 302 IPC. Nevertheless, from the point of view of the victim and his heirs, an innocent person aged about 27 years has lost his life in the process of saving the life of an innocent animal. As per the principles of victimology, therefore, imposition of fine for payment of compensation of the heirs of the deceased is as much a part of the criminal justice system as imposition of the sentence of imprisonment is Section 357 of the Code of Criminal Procedure, 1973 embodies this salutary principle.

13. Accordingly, in the facts and circumstances of the case, the interests of justice require imposition of the sentence of 10 years' RI with fine of Rs.20,000/-. If the fine is paid, out of the said amount the entire amount shall be paid as compensation to the heirs of deceased Savabhai under Sub-Section 4 of Section 357 of the Code of criminal Procedure, 1973. In case of default in payment of fine, the appellant shall undergo RI for a further period of two years and six months.

14. In view of the above discussion, the judgment and order of conviction of the appellant-for the offence punisbanle u/s 302 of the I.P.C. is altered to conviction for the offence punishable u/s 304 Part-I of the I.P.C. and the appellant is directed to undergo Rigorous Imprisonment for 10 years and to pay fine of Rs.20,000/- and in default there of to undergo Rigorous Imprisonment for two and half years. Amount of fine if paid, be given as compensation to the heirs of deceased Savabhai. The order of conviction of the appellant-convict under Section 135 of Bombay Police Act is set aside. Appeal stands disposed of accordingly. Appeal is allowed to that extent.

(M.S.SHAH, J.)

(B.N.Mehta, J.)

/JVSatwara/